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IN THE
Supreme Court of the United States
OCTOBER TERM, 1993

DEPARTMENT OF REVENUE OF THE STATE OF OREGON,
Petitioner,

v.

ACF INDUSTRIES, INC., *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF RESPONDENTS

JAMES W. MCBRIDE *
HEISKELL, DONELSON, BEARMAN, ADAMS, WILLIAMS & CALDWELL
1211 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-8501

CARTER G. PHILLIPS
CHRISTOPHER R. DRAHOZAL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondents

* Counsel of Record

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QUESTIONS PRESENTED

1. Whether the Oregon tax at issue here, which fully taxes rail personal property while exempting more than two-thirds of other business personal property, discriminates in violation of 49 U.S.C. § 11503(b)(4).

2. Whether the proper remedy for such a violation of § 11503(b)(4) is to enjoin the tax as applied to respondents' rail cars.

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STATEMENT OF THE CASE

Petitioner has stipulated that it fully taxes all tangible personal property of respondents while it exempts from personal property taxes at least 67 percent of its business tangible personal property tax base. However else this practice might be described, it plainly is discriminatory. There is no equality in taxation for respondents' personal property as compared to other business personal property. Instead, respondents watch most other taxpayers in Oregon use political influence to obtain special treatment while rail personal property continues to be fully taxed. Amazingly, 17 years after Congress condemned such practices, Oregon maintains this system of gross inequality. It is unlawful and the court of appeals correctly struck it down.

1. *Background.* As the Oregon legislature obviously recognized, railroads " 'are easy prey for State and local tax assessors' " because "they are 'nonvoting, often nonresident, targets for local taxation,' who cannot easily remove themselves from the locality." *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 131 (1986) (quoting S. Rep. No. 630, 91st Cong., 1st Sess. 3 (1969)); see Pet. Br. 37. Railroads, as interstate carriers, tend to have nonresident customers and nonresident shareholders; accordingly, they are tempting targets for state tax authorities seeking to favor local interests.[1] See R. Posner, *Economic Analysis of Law* 643 (4th ed. 1992). Moreover, "so many railroad assets are at once specialized to railroading and physically immobile that it is very difficult for railroads to escape heavy taxation by transferring the assets to another industry or location; in other words, the 'exit' option for limiting political exploitation is denied them." *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1186 (7th Cir. 1991).

For decades, States took advantage of the railroads' vulnerability to discriminatory taxes. In 1961, the "Doyle Report," as part of its study of the reforms needed to revitalize a struggling railroad industry in the United States, found that "there is a studied and deliberate practice of assessing railroad property at a proportion of full value substantially higher than other property subject to the same tax rates."[2] The problem was not a new one then. In 1944, "[t]he officials of approximately half the States readily concede[d] that railroads are being overtaxed because of inadequate equalization." H. Doc. No. 160, 79th Cong., 1st Sess. (1944). Indeed, four years earlier, this Court had heard and rejected a federal constitutional challenge to similar discriminatory assessment practices in *Nashville, Chattanooga & St. Louis Ry.* v. *Browning*, 310 U.S. 362, 369 (1940).

[1] "It is this temptation to excessively tax non-voting, nonresident businesses in order to subsidize general welfare services for state residents that made federal legislation in this area necessary." *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 131 (1987).

[2] *See* S. Rep. No. 445, 87th Cong., 1st Sess. 458 (1961). The Report was informally named after the Staff Director of the Study Group, John P. Doyle.

After issuance of the Doyle Report, Congress held a series of hearings to consider legislation addressing state tax discrimination against railroads. On the basis of those hearings, Congress found that state tax discrimination against railroads was indeed widespread and concluded "that such discrimination must be ended." *E.g.*, S. Rep. No. 1085, 92d Cong., 2d Sess. 7 (1972). For example, a 1972 Senate Committee Report reprinted a table listing the 16 States that imposed the greatest excess tax burden on railroads. Those States on average overtaxed railroads relative to other property in the State by almost 40 percent.[3] *Id.* at 6. Congress further noted an "ominous trend": more and more States were considering shifting from reliance on discriminatory assessments to the use of other means of discrimination, such as higher tax rates on railroad property, "as the most effective means of perpetuating tax discrimination." S. Rep. No. 630, 91st Cong., 1st Sess. 6 (1969).

Although "[y]ear after year the States . . . asked for postponement of . . . [antidiscrimination] legislation . . . to put their house in order," discrimination persisted. *Id.* at 15. In 1975, Congress found that because of discriminatory state taxation, "railroads are over-taxed by at least $50 million each year." H.R. Rep. No. 725, 94th Cong., 1st Sess. 78 (1975).

2. *4-R Act.* In response to the profound financial plight of the railroad industry generally and specifically

[3] Twelve of those 16 States (Arizona, Idaho, Mississippi, Missouri, Montana, Nebraska, North Dakota, Ohio, Oklahoma, South Carolina, Tennessee, and Utah) are before this Court as *amici* supporting petitioner. The table was provided to the Committee by the Association of American Railroads.

to the "long-standing burden on interstate commerce" created by discriminatory state taxing schemes, S. Rep. No. 630, *supra*, at 1, Congress enacted section 306 of the Railroad Revitalization and Regulatory Reform Act of 1976, Pub. L. No. 94-210, 90 Stat. 31, 54 (Feb. 5, 1976) (the "4-R Act"). The broad purpose of the 4-R Act, as declared by Congress, was "to provide the means to rehabilitate and maintain the physical facilities, improve the operations and structure, and restore the financial stability of the railway system of the United States." Id. § 101(a), 90 Stat. at 33. Integral to achieving this congressional purpose, "particularly the goal of furthering railroad financial stability, was a prohibition on discriminatory state taxation of railroad property." *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 (1987).

That prohibition, as currently codified in § 11503(b) of Title 49,[4] prohibits four "acts" deemed to "unreasonably burden and discriminate against interstate commerce." Pet. Br. 2. Subsection (b)(1) prohibits a State from assessing rail transportation property at a higher ratio to its market value than the ratio of assessed value to market value of other commercial and industrial property in the jurisdiction.[5] Subsection (b)(2) prohibits a State

[4] The language of the original § 306 was "slightly altered" when the provision was recodified in 1978. *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 457 n.1 (1987); *see* Act of Oct. 17, 1978, Pub. L. No. 95-473, 92 Stat. 1337 *et seq.* Congress expressly directed that these changes in language "may not be construed as making a substantive change in the laws replaced." *Id.* § 3(a), 92 Stat. 1466; *see also Muniz* v. *Hoffman*, 422 U.S. 454, 467-74 (1975) (recodification presumed not to change substance of law). For the convenience of the Court, we generally will refer to the language of § 11503 as recodified, although we will discuss the original language as necessary to aid in construing the section.

[5] Section 11503(b)(4) defines "commercial and industrial property" as "property, other than transportation property and land

from levying or collecting such a discriminatory tax. Subsection (b)(3) prohibits a State from levying or collecting a property tax that discriminates by taxing railroad property at a higher rate than is generally applicable to other commercial and industrial property in the jurisdiction. Subsection (b)(4), the provision at issue in this case, is a catch-all that prohibits a State from "impos[ing] another tax that discriminates against a rail carrier."[6]

3. *Oregon Personal Property Tax.* Oregon law subjects "all tangible personal property situated within this state, except as otherwise provided by law, . . . to assessment and taxation in equal and ratable proportion."[7] Ore. Rev. Stat. § 307.030. As of January 1, 1988, a total of $4.8 billion of business personal property in Oregon was taxed. Stipulation Nos. 30, 31, J.A. 18. Although Oregon law requires property not otherwise exempt from tax to be valued and assessed at 100 percent of market value, Ore. Rev. Stat. § 308.250, the parties stipulated that almost half of non-exempt business personal property was not taxed due to undervaluation and underreporting. Stipulation No. 43, J.A. 19 ($4.4 billion). Respondents' rail cars, however, were assessed

used primarily for agricultural purposes or timber growing, devoted to a commercial or industrial use and subject to a property tax levy."

[6] The original language of subsection (b)(4), prior to recodification, prohibited "[t]he imposition of any other tax which results in discriminatory treatment of a common carrier by railroad subject to this part." § 306(1)(d), 90 Stat. at 54.

[7] "Tangible personal property" is defined as "all chattels and moveables, such as boats and vessels, merchandise and stock in trade, furniture and personal effects, goods, livestock, vehicles, farming implements, moveable machinery, moveable tools and moveable equipment." Ore. Rev. Stat. § 307.020(3). Standing timber is defined as real property, not tangible personal property. *Id.* § 307.010(1) ("'Real property' includes . . . all mines, minerals, quarries and trees in, under or upon the land").

and taxed at no less than their full and true cash value.[8] Stipulation No. 29, J.A. 18.

Oregon law exempts from personal property tax non-farm business inventories, a highly mobile factor of production. Ore. Rev. Stat. § 307.400(2), (3)(d). This exemption removed an estimated $6.8 billion worth of property from Oregon's personal property tax base in 1988.[9] Stipulation No. 33, J.A. 18. Oregon also expressly exempts from the tax agricultural machinery and equipment (Ore. Rev. Stat. § 307.400(2), (3)(a)-(c)); livestock, poultry, bees, and fur-bearing animals (*id.* § 307.400(1)); and agricultural products in the possession of farms (*id.* § 307.325). These exemptions, which uniquely benefit local taxpayers, excluded an estimated $1.4 billion worth of property from Oregon's personal property tax base in 1988. Stipulation No. 32, J.A. 18.

Oregon exempts most motor vehicles from the personal property tax as well and instead charges a motor vehicle registration fee. Ore. Rev. Stat. § 803.585. In 1988, the registration fee paid on business motor vehicles was a flat $10 per year, payable to the Department of Motor Vehicles. *Id.* § 803.420(1) (1987). The exemption of business and agricultural motor vehicles excluded an additional $1.5 billion worth of property from the personal property tax base.[10] Stipulation No. 34, J.A. 18.

[8] Most property is assessed locally by county assessors. *See* Ore. Rev. Stat. § 308.210(1). Railroad property is assessed centrally by petitioner, which determines the "integrated unit of railroad operating properties and then allocate[s] a portion of that value, by means of a formula, to . . . operations in the State of Oregon." *Union Pac. R.R.* v. *Department of Revenue*, 843 P.2d 864, 866 (Or. 1992).

[9] Oregon law also exempts intangible personal property (money, bonds, notes, etc., *see* Ore. Rev. Stat. § 307.020(1)) from the property tax. As of January 1, 1986, petitioner estimated the market value of intangible personal property in Oregon to be $65 billion. Stipulation No. 41, J.A. 19.

As a result of these statutory exemptions, over two-thirds of business tangible personal property in Oregon is exempt from tax.[11] Petitioner acknowledged the effect of these exemptions on the tax burden borne by non-exempt taxpayers such as respondents in a November 1988 report entitled *Oregon's Property Tax System: The Disintegration Continues,* a copy of which appears in the record. In that Report, petitioner explained that "[p]roperty tax exemptions and preferential assessments are significant because they have a direct bearing on the tax base": "[a] broad tax base eases the burden on individual taxpayers while a constricted tax base accentuates the individual taxpayer's burden." *Id.* at 28. Exemptions such as these, according to petitioner, directly "shift[] the cost of services" from property that is exempt to property, such as respondents' rail cars, that is valued at market. *Id.*

4. *Proceedings in this Case.* Respondents are private carline companies that furnish railroad cars for use by railroads, either by leasing the cars to shippers or directly to railroads. Stipulation No. 5, J.A. 12. As explained thoroughly in the Brief for the Association of American Railroads as *Amicus Curiae* at 5, "the carlines are an integral part of the Nation's railway system." The long-standing relationship between the railroads and the carline

[10] Standing timber (which is real property under Oregon law, *see supra* n.7) also is exempt from property tax; instead, standing timber is subject to a severance tax imposed when it is harvested. Ore. Rev. Stat. §§ 321.272, .420.

[11] A total of $9.7 billion of tangible personal property ($1.4 billion of agricultural property, $6.8 billion of business inventories, and $1.5 billion of motor vehicles) is exempt, and only $4.8 billion is taxed. When undervalued and underreported personal property is considered, the percentage of property not taxed rises from 67 percent to 75 percent of the total. Stipulation No. 37, J.A. 18-19.

companies is detailed in the AAR's brief. *Id.* at 2-5. The Interstate Commerce Commission has determined that rail cars held under pooling agreements or used, but not owned, by railroads, constitute "transportation property" within the meaning of 49 U.S.C. § 11503(a)(3). Stipulation No. 21, J.A. 16.

a. On October 6, 1988, respondents filed suit in United States District Court for the District of Oregon seeking injunctive and declaratory relief against petitioner's assessment, collection, and levy of taxes on their personal property for the tax year 1988. J.A. 1-2. The complaint alleged that Oregon discriminated against respondents by taxing rail cars at no less than their actual value while exempting a substantial majority of other business personal property, in violation of 49 U.S.C. § 11503(b)(4).[12] The complaint sought an injunction against collection of the tax, either totally or in part. J.A. 8-9. The case was decided by the district court, following argument, on the briefs and stipulated facts.

The district court held for petitioner.[13] Refusing to accept petitioner's argument that subsection (b)(4) does

[12] Petitioner mischaracterizes the record when it asserts that in their complaint respondents "advocated the precise *per se* rule the Ninth Circuit adopted." Pet. Br. 9 n.4. Respondents have consistently taken the position—before the district court, the court of appeals, and now this Court—that the Oregon tax is unlawful because it taxes rail cars in full while exempting over two-thirds of other business personal property. *See infra* pp. 27-33; Pet. App. 16a ("On appeal the parties agree that if a 'majority' of nonrailroad property in Oregon is exempt from the ad valorem property tax imposed upon railroad property, discrimination is demonstrated under [subsection (b)(4)]").

[13] Petitioner argued before the district court that respondents lacked standing to bring a claim under § 11503 because they are not common carriers by railroad. The district court rejected this argument, Pet. App. 27a-28a, petitioner abandoned it on appeal, Pet. App. 7a n.2, and has expressly avowed that the issue "may be considered settled for purposes of review at this level." Pet. 5 n.5. Accordingly, respondents will not discuss this issue further.

not apply to discriminatory exemptions, the district court proceeded to analyze whether the Oregon tax was discriminatory. The court found no *de jure* discrimination under subsection (b)(4) because "Oregon [did] not commit either of the[] discriminatory acts" prohibited by subsections (b)(1) and (b)(3). Pet. App. 28a. The court also found no *de facto* discrimination, although it recognized that the issue posed a "more difficult" question. The court did not limit the relevant comparison to personal property. Instead, the court treated standing timber, which is subject to a severance tax when harvested, see *supra* n.10, as part of its discrimination calculation and held that only 38.2 percent of business personal property in Oregon was exempt from tax, which it concluded was below the line for illegality.[14] Pet. App. 30a-32a.

b. The court of appeals reversed. First, the court rejected petitioner's argument that subsection (b)(4) does not apply to property taxes, concluding that the provision "must be applied to cases of discriminatory property tax exemptions if Congress's purpose in enacting section 306 is to be served." Pet. App. 9a. Second, the court rejected petitioner's argument that the "subject to a property tax levy" language in the definition of commercial and industrial property excludes property tax exemption discrimination from subsection (b)(4): "[t]here is no analogous restriction in the broad language" of subsection (b)(4). Pet. App. 16a. Third, the court held that the Oregon tax violated subsection (b)(4) because "[t]he most natural reading of th[e] language [of the provision] is that the statute is violated by *any* exemption given to other taxpayers but not to railroads."[15] Pet.

[14] On rehearing, the district court stated that standing timber was real property, but nevertheless held that respondents "could not prevail unless standing timber is viewed as exempt from taxation," which, in the court's view, it was not. J.A. 29.

[15] The court of appeals assumed without deciding that petitioner was correct in arguing that (1) real property could be included

App. 16a (emphasis in original). Finally, the court held that the proper remedy for the violation of subsection (b)(4) was to enjoin collection of the personal property tax as applied to respondents' rail cars.

SUMMARY OF ARGUMENT

I.

The Oregon tax at issue here, which taxes rail personal property in full while exempting more than two-thirds of other business personal property, unlawfully discriminates in violation of 49 U.S.C. § 11503(b)(4). The plain language of the provision prohibits any property tax that discriminates by fully taxing rail *personal* property while exempting a majority of the *personal* property of other businesses in the State, as the Oregon tax does.

A. The plain language of § 11503(b)(4) demonstrates that it is a catch-all provision that, together with the other provisions of subsection (b), outlaw state tax discrimination against railroads "'in all of its guises.'" *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) (quoting *Southern Ry.* v. *State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)) (emphasis omitted). Accordingly, as the unanimous courts of appeals and the United States as *amicus curiae* in this case have concluded, a State may not, consistent with subsection (b)(4), impose a property tax that discriminates

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with personal property; (2) timber should be ignored in the calculation because it was subject to a severance tax in lieu of a property tax; and (3) undervaluation and underreporting should likewise be disregarded. Under those assumptions, according to the court, 24.7% of all business property in Oregon was exempt from the property tax, which was above any possible *de minimis* level. Pet. App. 17a-18a.

against railroads through exemption of the personal property of other businesses.

The legislative history of subsection (b)(4)—as opposed to the history of the other subsections of § 11503(b) on which petitioner relies—fully supports construing subsection (b)(4) as a catch-all. Congress refused to limit that subsection to taxes "in lieu" of property taxes and rejected an effort to exclude state constitutional classifications of property altogether from § 11503, including subsection (b)(4).

Finally, under the interpretation put forward by petitioner, § 11503 inevitably "would fall far short of its goal of ending discriminatory state taxation." United States Br. 14. Under petitioner's interpretation, fully taxing rail cars while partially exempting other business personal property (by taxing it at a lower rate or assessing it at a lower percentage of market value) would be unlawful, but fully taxing rail cars while totally exempting the other property from tax—which results in far greater discrimination against respondents—would not be. Such an absurd interpretation should be rejected.

B. The Oregon tax here unlawfully discriminates against respondents. The stipulated facts plainly show grossly unequal taxation of respondents: all of their personal property is taxed at no less than its fair market value, but over two-thirds of the personal property of other businesses is completely exempt from tax. By treating respondents' *personal* property differently from the majority of other business *personal* property in the State, the Oregon tax violates § 11503(b)(4).

Respondents' interpretation of subsection (b)(4) is necessary to provide the "political check" on state taxation that petitioner agrees is at the heart of § 11503. Moreover, it is consistent with the core principle embodied throughout § 11503(b), that is, railroad property

should be taxed equally with the general mass of other business property in the State.

Petitioner's contention, that a "generally applicable" tax does not discriminate against railroads if exemptions from the tax can be justified by an "independently valid reason," is without merit. An inquiry into the reasonableness of the exemptions is precluded by the plain language of the statute, which deems such discrimination to be unreasonable. Moreover, such an inquiry would nullify the protections Congress conferred on the railroad industry in subsection (b)(4).

II.

The proper remedy for the violation of § 11503(b)(4) in this case is to enjoin petitioner from collecting the discriminatory personal property tax from respondents. The Oregon tax discriminates by taxing respondents' personal property differently from more than 67 percent of other business personal property in the State. This discrimination properly is remedied by treating respondents' personal property equally with most other business personal property in Oregon—*i.e.*, by enjoining collection of the unlawful tax.

ARGUMENT

Petitioner has stipulated that it fully taxes all personal property of respondents while at the same time exempting from personal property taxes at least 67 percent of the personal property owned by other businesses. It defies both common sense and common understanding to describe this arrangement as anything but "discriminatory." Nevertheless, petitioner and its *amici* urge this Court to blink at this gross disparity in treatment, even though Congress in 1976 categorically ordered an end to "any other tax that discriminates" against railroads. They do so by urging on this Court a narrow and technical interpretation of the statute. But no amount of legal legerdemain can hide the basic problem with petitioner's position: Oregon's taxing scheme violates the requirement of basic tax equality embodied in 49 U.S.C. § 11503. Accordingly, the court of appeals correctly declared it unlawful.

I. THE OREGON TAX AT ISSUE HERE, WHICH DENIES RESPONDENTS EQUAL TAX TREATMENT BY FULLY TAXING RAIL CARS WHILE EXEMPTING OVER TWO-THIRDS OF OTHER BUSINESS PERSONAL PROPERTY, VIOLATES § 11503(b)(4).

"In the present case, the language of § 11503 plainly declares the congressional purpose." *Burlington N. R.R. v. Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). "In broad terms," *id.* at 457, § 11503 prohibits States from imposing any tax that discriminates against railroads. The taxes described in subsections (b)(1) through (b)(3) are explicitly prohibited, as is "another tax"—"any other tax" in the original language of subsection (b)(4)—that discriminates against railroads. Petitioner perfunctorily contends that its tax is not discriminatory and that the remedy ordered by the court of appeals was excessive. But petitioner's primary—almost exclusive—

argument in this Court is that Congress did not intend to prohibit it from imposing a discriminatory property tax, so long as the tax discriminates only through exemptions and not through disparate assessment ratios or tax rates. In effect, petitioner urges an interpretation of the statute that would permit States to exempt all intangible personal property from tax *except* that of railroads.

The district court and the court of appeals in this case, along with the United States as *amicus curiae* and every other court of appeals that has addressed the question, have flatly and correctly rejected petitioner's extreme argument. The Oregon tax at issue here, which discriminates against railroads by fully taxing rail cars while exempting over two-thirds of the personal property of other businesses from tax, plainly is "another tax that discriminates against a rail carrier." 49 U.S.C. § 11503 (b)(4). It deprives respondents of the very protection Congress intended to afford: equality of tax treatment with the general mass of business property in the State. Accordingly, the court of appeals correctly directed the district court to enjoin collection of this fundamentally unequal tax from respondents.

A. Section 11503(b)(4) Is A "Catch-All" That Outlaws State Property Taxes That Discriminate Against Railroads By Fully Taxing Railroad Property While Exempting Other Business Property.

In enacting § 11503, the manifest purpose of Congress was to end discriminatory taxation of railroads by the States. Because § 11503 unquestionably prohibits "another tax that discriminates against" railroads, this Court's "task is simply to ascertain the fair meaning of that term." *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2454 (1992). Under the plain language of subsection (b)(4), a state property tax that discriminates against railroads by fully taxing railroad property

while exempting more than half of the property of other businesses is unlawful.

1. Section 11503(b)(4), together with the other provisions of § 11503(b), are broad and all-encompassing in their prohibition of discriminatory state taxes. Section 11503 does not exclude any state taxes, imposed on property or otherwise, or any method of effecting discriminatory treatment from its ban on discrimination. To the contrary, the plain language of § 11503 prohibits state tax discrimination against railroads " 'in all of its guises,' " including through property tax exemptions. *E.g., Department of Revenue* v. *Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) (quoting *Southern Ry.* v. *State Bd. of Equalization*, 715 F.2d 522, 528 (11th Cir. 1983), *cert. denied*, 465 U.S. 1100 (1984)) (emphasis omitted). Had Congress intended to exclude property taxes or some other sort of state tax altogether from the reach of subsection (b)(4), it readily could have done so, as it did in other legislation. For example, in § 7 of the Airport Development Acceleration Act of 1973, Congress forbids states to levy or collect various charges on air carriers or airline passengers. Congress, however, specifically excluded "property taxes, net income taxes, franchise taxes, and sales or use taxes" from the prohibition. 49 U.S.C. app. § 1513; see *Aloha Airlines, Inc.* v. *Director of Taxation*, 464 U.S. 7 (1983). No such exclusion appears in § 11503(b)(4). See *West Virginia Univ. Hosps., Inc.* v. *Casey*, 111 S. Ct. 1138, 1147 (1991) (rejecting interpretation of statutory language when Congress "could easily" have enacted language supporting that interpretation "as it did in contemporaneous statutes").

Likewise, nothing in the language of subsection (b)(4) limits its application to taxes imposed "in lieu" of property taxes, as petitioner suggests the provision should be interpreted (Pet. Br. 25), or otherwise excludes discrim-

inatory exemptions from its reach. Again, Congress is perfectly capable of addressing in-lieu taxes specifically when it so intends. *E.g.*, Airport & Airway Improvement Act of 1982, 49 U.S.C. app. § 1513(d)(3) (subsection prohibiting State from imposing discriminatory taxes on air carriers "shall not apply to any in lieu tax which is wholly utilized for airport and aeronautical purposes"); see *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123 (1987). In § 11503(b)(4), by contrast, Congress acted broadly and without any exclusions.

Here, as in *Burlington Northern R.R.* v. *Oklahoma Tax Commission*, 481 U.S. 454, 461 (1987), "the language of § 11503 plainly declares the congressional purpose." That purpose "was to prevent tax discrimination against railroads in any form whatsoever." *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 210 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981). Subsections (b)(1) through (b)(3) of § 11503 list specific taxes that Congress deemed unlawfully discriminatory. Subsections (b)(1) and (b)(2) prohibit a property tax that discriminates against railroads through differential assessment of railroad property. 49 U.S.C. § 11503(b)(1)-(b)(2). Subsection (b)(3) prohibits a property tax that discriminates against railroads through differential tax rates. *Id.* § 11503(b)(3). Following this list of discriminatory taxes, subsection (b)(4) then bars states from "impos[ing] another tax that discriminates against a rail carrier." On its face, (b)(4) is a "catch-all" that outlaws all state taxes that discriminate against railroads *in addition to* those described in subsections (b)(1) through (b)(3).[16] See *Alabama Great S. R.R.* v. *Eagerton*, 663 F.2d 1036, 1040 (11th Cir. 1981). By its plain terms,

[16] *E.g.*, *Black's Law Dictionary* 84 (5th ed. 1979) (defining "another" as meaning "additional"); *Webster's New Collegiate Dictionary* 47 (1981) (defining "another" as "being one more in addition to one or more of the same kind").

therefore, subsection (b)(4) prohibits property taxes that discriminate through exemptions.

The language of section 306 prior to its recodification confirms that respondents' interpretation of subsection (b)(4) is not only proper, but compelled. Although petitioner has stipulated that the original language of section 306 is controlling, Stipulation No. 3, J.A. 12, it essentially ignores that language in its brief to this Court. As originally enacted, section 306(1)(d)—the original version of subsection (b)(4)—outlawed "[t]he imposition of any other tax which results in discriminatory treatment" of a railroad. 90 Stat. at 54. Because the term "'any' encompasses 'all,'" the language of section 306 reveals plainly that it was intended as a catch-all. *E.g.*, *Mobil Oil Exploration & Producing Southeast, Inc.* v. *United Distrib. Cos.*, 498 U.S. 211, 223 (1991). Indeed, "[i]t would be difficult to imagine statutory language that would be less needful of construction than the 'any other' language used here." *Alabama Great S. R.R.*, 663 F.2d at 1040; see also *Richmond, F. & P. R.R.* v. *Department of Taxation*, 762 F.2d 375, 379 (4th Cir. 1985) (same). If Congress had intended that the provision not apply to property taxes, it could have prohibited "any tax other than a property tax"; if Congress had intended that the provision apply only to property taxes, it could have prohibited "any other property tax." 663 F. 2d at 1039. Instead, Congress broadly prohibited "any other tax which results in discriminatory treatment" of railroads, unambiguously covering both discriminatory property taxes and non-property taxes and unambiguously prohibiting taxes that discriminate both through exemptions and otherwise.

The United States, as *amicus curiae*, agrees that subsection (b)(4) applies generally to property taxes and specifically to discriminatory property tax exemption prac-

tices. The United States firmly concluded, both at the certiorari stage and on the merits in this case, that "Subsection (b)(4) prohibits tax discrimination against 'rail carriers' in any form and by any method," including through exemptions of other business property. United States Br. 12-13; see also *id.* at 11 ("under Subsection (b)(4), the States are precluded from employing property tax exemptions in a manner that results in discrimination against rail carriers); United States Br. 10 (at petition stage) ("[property tax] exemptions are properly to be considered in determining whether the State has, by this other tax method, effected discrimination against rail carriers").

Likewise, every court of appeals to have addressed the question has held, like the Ninth Circuit in this case, Pet. App. 9a-16a, that subsection (b)(4) is a catch-all provision that prohibits property taxes that discriminate by taxing railroad property in full while exempting other business property. See *Trailer Train Co.* v. *Leuenberger*, 885 F.2d 415, 416-17 (8th Cir. 1988) ("Tax exemptions are to be considered in determining whether there has been discriminatory treatment under § 306(1)(d)"), *cert. denied*, 490 U.S. 1066 (1989); *Department of Revenue* v. *Trailer Train Co.*, 830 F.2d 1567, 1573 (11th Cir. 1987) ("§ 306(1)(d) requires consideration of tax exemptions in determining whether there has been discriminatory treatment"); *Burlington N. R.R.* v. *Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985) ("This type of *de jure* discrimination clearly falls within the prohibition of § 306(1)(d)); *Trailer Train Co.* v. *State Bd. of Equalization*, 710 F.2d 468, 473 (8th Cir. 1983) (subsection (b)(4) "proscribes the State Board's discriminatory practice of taxing the Carlines' personal property, while exempting from taxation the personal property of other commercial and industrial taxpayers"); *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 209-10 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981).[17]

The only fair reading of subsection (b)(4) is as a catch-all that, together with subsections (b)(1) through (b)(3), prohibits all state taxes that discriminate against railroads. Accordingly, a state property tax that discriminates against railroads by exempting other business property is covered by the plain language of § 11503(b)(4).

2. The arguments of petitioner and its *amici* to the contrary are not persuasive. Initially, Congress' use of the word "another" to modify the phrase "tax that discriminates" plainly does not limit the provision to taxes other than property taxes.[18] While petitioner is correct that the word "another" "necessarily takes its meaning from what precedes it" (Pet Br. 11), that meaning is not one of "contrast." Instead, the context of its use, coming as it does after a listing of discriminatory taxes, plainly

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[17] *But see Richmond, F. & P. R.R.* v. *State Corp. Comm'n*, 336 S.E. 2d 896, 897 (Va. 1985) (holding that subsection (b)(4) does not apply to discriminatory property taxes). Even petitioner grudgingly admits, in an advocate's understatement, that the "weight of authority" rejects its position. Pet. 17.

[18] Several of petitioner's *amici* previously have argued the opposite extreme—that subsection (b)(4) is *limited* to other discriminatory property taxes and does not apply at all to taxes other than property taxes. *See Trailer Train Co.* v. *Bair*, 765 F.2d 744, 745 & n.1 (8th Cir.), *cert. denied*, 474 U.S. 1021 (1985) (Iowa); *Richmond, F. & P. R.R.* v. *Department of Taxation*, 762 F.2d 375, 378-79 (4th Cir. 1985) (Virginia). That position flatly conflicts with the position they take now. *See* Iowa Br. 3; Wash. Br. 5. Indeed, the position taken by the State of Iowa in *Trailer Train* contradicted the position it took at the same time in another case pending before the same court of appeals. *See Burlington N. R.R.* v. *Bair*, 766 F.2d 1222, 1224 (8th Cir. 1985); *see also Trailer Train*, 765 F.2d at 745 & n.1. This opposite position is equally incorrect: as explained above, subsection (b)(4) is most naturally read as a catchall that together with subsections (b)(1) through (b)(3) prohibits all discriminatory state taxes, property and otherwise. *See supra* pp. 15-19.

refers to "additional" discriminatory taxes, not different kinds of taxes.[19] See *supra* pp. 16-17. Such an interpretation does not read the word "another" out of the statute, as petitioner asserts. Pet. Br. 13. To the contrary, it reconciles the provision with the previous ones: subsections (b)(1) through (b)(3) prohibit certain discriminatory taxes, and subsection (b)(4) prohibits any and all others.[20]

Likewise, petitioner's reliance on the statutory definition of "commercial and industrial property" is misplaced. That definition limits comparisons under subsections (b)(1) through (b)(3) to property "subject to a property tax levy"; it does not prevent scrutiny of property tax exemptions under subsection (b)(4). By its terms, the definition of "commercial and industrial property" applies only to subsections (b)(1) through (b)(3), which contain that phrase, and not subsection (b)(4), which does not. Had Congress intended to exclude state prop-

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[19] The decisions in *Gordon* v. *Appeal Tax Court*, 44 U.S. (3 How.) 133 (1845), and *Cami* v. *Central Victoria, Ltd.*, 268 U.S. 469 (1925), relied on by petitioner (Pet. Br. 11) and its *amicus* the State of Washington (Wash. Br. 8), require no different result. In *Gordon*, the Court invalidated a state tax on shares of stock held by bank stockholders; it refused to limit statutory protection against "any further tax" to any further franchise tax of the sort already imposed on the bank. 44 U.S. (3 How.) at 147. In *Cami*, the Court rejected an attempt by Puerto Rico to impose an additional tax on sugar that would have resulted in a cumulative tax burden in excess of the statutory limit; the authorization to impose "any other impost, excise or tax" was subject to the previously expressed limit. 268 U.S. at 471. Neither case provides any support for construing narrowly the prohibition here against "another tax that discriminates" against railroads.

[20] Nor is the rule that specific provisions control over general ones (*see* Wash. Br. 8-9) to the contrary. The plain terms of subsection (b)(4) reconcile its general prohibition with the additional specific ones that come before it. *See, e.g., United States* v. *Powell*, 423 U.S. 87, 90-91 (1975).

erty tax exemptions from scrutiny under subsection (b)(4) it could easily have done so. But it did not.

Even if the phrase "subject to a property tax levy" excludes all exempt property from the comparison made under subsections (b)(1) through (b)(3), an issue that is not before this Court,[21] such an exclusion makes sense only with respect to those subsections. The definition of "commercial and industrial property" limits the properties to which railroad property is to be compared in determining whether assessments and rates are discriminatory. Under subsections (b)(1) through (b)(3), Congress made a determination of what constitutes comparable *property*. Under subsection (b)(4), the subject of protection is not "rail transportation property" but "common carriers by rail." Specific reference to the definition of "commercial and industrial property" is not necessary. For purposes of subsection (b)(4), comparison to other businesses is required because it is clear that Congress intended for railroads and rail property to be treated equally with other businesses and other business property generally.

Petitioner's extensive discourse on the 15-year legislative history of § 11503 also does not aid its cause. Because the language of subsection (b)(4) unambiguously extends to property taxes that discriminate through exemptions, petitioner's "crude gropings into the consistently dark closets of legislative history"[22] are simply

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[21] In *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123 (1987), this Court noted probable jurisdiction in a case presenting that issue under the Airport and Airway Improvement Act of 1982, 49 U.S.C. app. § 1513(d), which does not contain a provision equivalent to subsection (b)(4). The Court did not decide the issue in that case, however, concluding instead that the challenged tax was an "in lieu" tax expressly permitted under that Act. 480 U.S. at 134.

[22] *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 373 (5th Cir. 1987).

"irrelevant." *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 461 (1987). When Congress has spoken plainly to the matter at hand, the Court's inquiry comes to an end. *E.g., Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1149 (1992). To the extent consideration of the legislative history is appropriate here, however, the brief history of subsection (b)(4)—as opposed to the lengthy history of subsections (b)(1) through (b)(3)—fully supports construing it as respondents urge.

In its analysis of the legislative history, petitioner focuses almost exclusively on Congress' deliberations concerning the statutory definition of commercial and industrial property.[23] After a lengthy discussion of that history, petitioner concludes that by 1972 the "debate appeared settled" that exempt property would be excluded from the comparison class established by that definition. Pet. Br. 21. Now is not the time to debate that history; as stated above, the scope of that provision is not before the Court. But it is plain that anything that might have been settled by 1972 as to subsections (b)(1) through (b)(3) could not have been settled as to subsection (b)(4), which was not even added to the proposed legislation until two years later. See Pet. Br. 22 (noting appearance of subsection (b)(4) in 1974). See generally *Barnhill* v. *Johnson*, 112 S. Ct. 1386, 1391 (1992) (statements in legislative history that apply only to one section of statute provide "no basis" for construing different section of statute).

Instead, the shorter but more relevant legislative history of subsection (b)(4) dispels any notion that Congress intended to limit the provision to taxes other than property taxes. First, Congress flatly rejected any characterization of the provision as applying only to taxes "in lieu"

[23] In addition, petitioner relies substantially on testimony at congressional hearings, rather than committee reports or even floor debate, in its reconstruction of that legislative history. The value of such evidence in ascertaining *Congress'* intent is questionable, at best. *See Kelly* v. *Robinson*, 479 U.S. 36, 51 n.13 (1986).

of property taxes. Although petitioner and its *amici* make much of the fact that a House Report and a witness at a Senate hearing described subsection (b)(4) as prohibiting imposition of an "in-lieu" tax,[24] they ignore that such a narrow characterization was ultimately rejected by the Conference Committee. The Conference Report described the bill passed by the Senate as prohibiting "the imposition of any other tax which results in discriminatory treatment of any common or contract carrier," and the House amendment as outlawing "the imposition of a discriminatory 'in-lieu tax.'" S. Rep. No. 595, 94th Cong., 2d Sess. 166 (1976), *reprinted in* 1976 U.S.C.C.A.N. 180. The Report makes clear that "[t]he conference substitute follows the Senate bill." *Id.*

Second, Congress flatly rejected an attempt to limit the scope of § 11503—including subsection (b)(4)—to preserve state constitutional provisions that provided "for a reasonable classification of *property* for State purposes." S. 2718, § 207(d), *reprinted in* 121 Cong. Rec. S21078 (Dec. 4, 1975) (emphasis added). This "Tennessee amendment," so-called because it was proposed by Tennessee legislators to protect a provision recently added to the Tennessee constitution,[25] on its face would have

[24] Pet. Br. 23; NCSL Br. 16; Wash. Br. 16-17. In any event, that the provision was described in the legislative history as prohibiting discriminatory gross receipts and other in lieu taxes does not exclude other taxes—including property taxes—from the reach of the provision. *See Pension Benefit Guaranty Corp.* v. *LTV Corp.*, 496 U.S. 633, 649 (1990) ("the language of a statute . . . is not to be regarded as modified by examples set forth in the legislative history"). Moreover, that discriminatory property tax exemptions were not explicitly addressed in congressional hearings on the proposed legislation (Wash. Br. 25) is not surprising, because such exemptions did not become common until the 1970s and thereafter. D. Netzer, *Personal Property Taxation in the United States* Table 1 & 5 (Sept. 12-14, 1985) (paper presented at Conference of the Committee on Taxation, Resources & Economic Development).

[25] The Tennessee constitutional provision provided that residential and agricultural property was to be assessed at 25 percent of its

permitted not only classification for assessment and rate purposes, but also classifications that totally exempted property from tax.[26] Moreover, unlike the "subject to a property tax levy" language relied on by petitioner, this limitation would have applied to subsection (b)(4) as well as to subsections (b)(1) through (b)(3). The provision was included in the bill that passed the Senate, but an amendment containing the provision was defeated in the House, 121 Cong. Rec. H12814-15 (Dec. 17, 1975), and ultimately the provision was rejected by the Conference Committee as well.

In essence, petitioner's position is that, in enacting § 11503, Congress intended to outlaw state taxes that discriminate against railroads *except* property taxes that discriminate by exempting other business property. Under petitioner's interpretation, it would be unlawful for a State to tax rail cars in full while exempting other business personal property partially from tax by assessing it at a substantially lower percentage of market value than railroad property. But it would not be unlawful to tax rail cars in full while exempting that same property from tax altogether, even though a total exemption would result in greater discrimination against railroads. Such an absurd interpretation should be rejected. See, *e.g.*, *Rowland* v. *California Men's Colony*, 113 S. Ct. 716, 720

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market value, commercial and industrial property at 40 percent of its market value, and railroad and public utility property at 55 percent of its market value. 121 Cong. Rec. H12815 (Dec. 17, 1975) (statement of Rep. Beard). Opponents of the amendment stated that there were 17 other States "whose constitutions can be so interpreted." *Id.* at H12816 (statement of Rep. Adams).

[26] For example, Congress had previously been told by Charles Conlon of the National Association of Tax Administrators, in testimony cited by petitioner (Pet. Br. 16), that exemptions for timber in certain states were permissible only because of state constitutional provisions in those states permitting such classifications. *See Discriminatory Taxation of Common Carriers, 1967: Hearings on S. 927 Before the Subcomm. on Surface Transp. of the Senate Comm. on Commerce*, 90th Cong., 1st Sess. 98 (1967).

(1993) (describing "common mandate of statutory construction to avoid absurd results").

The consequence of petitioner's interpretation, as the United States points out, would without doubt be that § 11503 would fall far short of its goal of ending discriminatory state taxation." United States Br. 14. States that previously discriminated by their assessments of railroad property and through imposing higher tax rates on railroad property would merely shift from those sorts of unlawful discrimination to what, under petitioner's view, would be perfectly lawful exemption discrimination. In the extreme case, petitioner's interpretation "would require the absurd conclusion that the States may exempt all commercial property other than railroad property from its property tax base without violating the statute." United States Br. 11 (at petition stage).

Such a concern is far from "fanciful." Pet. Br. 30. Even if it were true that no State ever would exempt all business property from tax (Pet. Br. 30), States have and will exempt all or most business *personal* property from tax. Indeed, at least ten States currently exempt all or virtually all personal property from tax. See United States Advisory Comm'n on Intergovernmental Relations, 1 *Significant Features of Fiscal Federalism: Budget Processes & Tax Systems* 140 (Feb. 1992).

Moreover, in its *amicus* brief the United States describes a number of cases in which States "have employed broad exemption schemes to place discriminatory tax burdens on rail carriers." United States Br. 14-15. For example, in *Burlington Northern R.R.* v. *Bair*, 766 F.2d 1222 (8th Cir. 1985), Iowa's rollback of personal property taxes resulted in the exemption of "ninety-five percent of personal property owners from taxation" while railroad personal property remained fully taxed. *Id.* at 1224. The *amicus* brief of Association of American Railroads (pp. 20-21) meanwhile details a specific attempt by the State of Kansas to avoid the results of a court decision finding

discrimination under subsection (b)(1) by completely exempting large amounts of personal property. The broad language of subsection (b)(4) was intended precisely to prevent such actions, and should be given full effect. Because the statute can only achieve its objective under respondents' interpretation, the argument by petitioner and its *amici* that the Court should construe the language more "narrowly" to accommodate concerns of federalism is misplaced. It is the antithesis of a "fair" reading of the statute to interpret it so that it does not accomplish its stated goal. See *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992).

In short, as the plain language, purpose, and legislative history of subsection (b)(4) make clear, the subsection can only be understood as a catch-all, designed to prevent states from shifting from discriminatory property tax assessments and rates to other forms of discrimination. A property tax that discriminatorily taxes railroad property while exempting other business property plainly is "another tax that discriminates against" railroads. The court of appeals properly held that § 11503(b)(4) applies to this case.

B. Oregon's Tax Discriminates Against Railroads By Denying Respondents Equal Tax Treatment.

The court of appeals also correctly held that the Oregon tax at issue here discriminates against respondents in violation of § 11503(b)(4). That tax is discriminatory because it denies respondents' *personal* property equal tax treatment with the majority of other business *personal* property in Oregon: rail cars are fully taxed while over two-thirds of the personal property of other businesses is exempt.[27] Although the court of appeals, in stating that

[27] When undervalued and underreported property is included, the proportion of other business personal property in Oregon that is not taxed rises to 75 percent.

"any exemption not also available to railroads violates the statute" (with a possible *de minimis* exception), Pet. App. 17a, ruled more broadly than necessary to decide this case, it reached the correct result. Accordingly, its judgment should be affirmed.[28]

1. *At A Minimum, Subsection (b)(4) Prohibits A State From Imposing A Tax That Exempts Most Other Business Personal Property While Fully Taxing Rail Cars.*

Whatever the full scope of the protection provided by § 11503(b)(4) might be, it is plain that a State that taxes rail cars in full while exempting a majority of other business personal property unlawfully discriminates against railroads. Such a tax altogether lacks the "political check" on excessive taxation that the parties agree is at the heart of § 11503 and that Congress expressly incorporated into subsections (b)(1) through (b)(3). Petitioner's contrary contention, that subsection (b)(4) applies only to taxes that explicitly single out railroads and not to taxes that fail to treat railroads equally with other business property, is meritless. Such an interpretation would leave railroads all too easy prey for continued discriminatory taxation by the States, contrary to Congress' manifest intent in enacting § 11503(b)(4).

The parties agree that § 11503 is aimed "to prevent tax discrimination against the railroads [by] t[ying] their tax fate to the fate of a large and local group of taxpayers." *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 375 (5th Cir. 1987). Such "[a] 'political check' is provided when a state tax falls on a significant group of state citizens who

[28] The position respondents take here is the same one they took in the district court and the court of appeals: that the Oregon tax is unlawful because it taxes rail cars in full while exempting over two-thirds of the personal property of other businesses in the State. *See supra* n.12. The protection that the broad and flexible language of § 11503(b)(4) might afford under other circumstances can be decided in the appropriate case.

can be counted upon to use their votes to keep the State from raising the tax excessively." *Washington* v. *United States*, 460 U.S. 536, 545 (1983). Petitioner agrees that this "familiar" principle, "with roots almost as old as the Republic," is directly applicable here. Pet. Br. 37 & n.47 (no discrimination when "railroads are taxed as a constituent part of a large and diverse group of local and out-of-state taxpayers").[29] Indeed, Congress legislated in this area precisely because the railroads' lack of a political voice made them ready targets for discriminatory state taxes. See *supra* pp. 2-3.

To provide this essential political check, subsection (b)(4) should be interpreted, at a minimum, as prohibiting States from taxing railroad personal property in full when most other business personal property is exempt.[30] Under such an interpretation, railroad property will receive the same tax treatment as the majority of other business property, and "the owners of such commercial and industrial property can be expected to provide a strong check against any state discrimination." *Trailer Train Co.* v. *State Bd. of Equalization*, 697 F.2d 860, 867 n.11 (9th Cir.), *cert. denied*, 464 U.S. 846 (1983). As this Court stated in *Minneapolis Star & Tribune Co.* v. *Minnesota Commissioner of Revenue*, 460 U.S. 575, 585 (1983), "[w]e need not fear that a government will destroy a selected group of taxpayers by burdensome taxation if it must impose the same burden on the rest of its constituency." A tax like the Oregon tax here, which exempts over two-thirds of comparable property from the burden it imposes on rail property, lacks a sufficient political check and therefore is unlawful.

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[29] The United States concurs. United States Br. 28 ("The object of the statute . . . is to obtain for rail carriers equivalent treatment with the general mass of other taxpayers").

[30] That the proper comparison is between railroad *personal* property and other business *personal* property is clear, for the reasons explained below. *See infra* pp. 38-42.

The other subsections of § 11503(b) confirm that Congress' intent was to ensure that railroad property receive equal tax treatment with the general mass of business property in the jurisdiction. As petitioner points out (Pet. Br. 43), subsection (b)(1) requires railroad property to be treated for assessment purposes the same as the property of the "hypothetical 'average' taxpayer" in the State.[31] Subsection (b)(3) requires railroads to be taxed at no higher rate than the rate at which the majority of commercial and industrial property in the jurisdiction is taxed.[32] Subsection (b)(4), as a catch-all that prohibits

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[31] Under subsection (b)(1), the ratio of assessed value to market value of railroad property must be within five percent of the average ratio of assessed value to market value for all commercial and industrial property in the jurisdiction.

[32] Petitioner's flat statement—that "one point is beyond dispute: Congress intended that railroads would pay the same taxes the 'average' commercial taxpayer pays" (Pet. Br. 45)—not only undercuts entirely its attempted evisceration of the substantive standard for discrimination, but is simply wrong with respect to property tax *rates*. As the language of subsection (b)(3) prior to recodification makes clear, States may not tax railroad property "at a tax rate higher than the tax rate generally applicable to commercial and industrial property in the same assessment jurisdiction." § 306(1)(c), 90 Stat. at 54. This "generally applicable" language requires states to tax railroad property at the same rate as that applied to the *majority* of commercial and industrial property in the jurisdiction. *Trailer Train Co.* v. *State Bd. of Equalization*, 697 F.2d 860, 867 (9th Cir.) ("The tax rate applicable to the roll that contained the majority of the commercial and industrial property shall be deemed the rate generally applicable to commercial and industrial property"), *cert. denied*, 464 U.S. 846 (1983); *see also General Am. Transp. Corp.* v. *Kentucky*, 791 F.2d 38, 42 (6th Cir. 1986).

The similar assertion of the United States, that the weighted average tax rate is used when more than one tax rate is applicable (United States Br. 29), is equally incorrect. The weighted average rate is used only when there is no single rate applicable to the majority of commercial and industrial property. When there is such a majority rate, that rate is controlling. *Trailer Train*, 697 F.2d at 867 n.11 ("selection of the rate imposed on the majority

"any other tax which results in discriminatory treatment," should be construed as providing no lesser protection.

Such an interpretation also comports with decisions of the courts of appeals holding state taxes unlawful under circumstances similar to those here. For example, in *Trailer Train Co.* v. *Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), a decision endorsed by the United States in its brief (at p. 21), Nebraska exempted motor vehicles paying registration fees, agricultural products and machinery, and business inventories—the very exemptions at issue here—from its tax on tangible personal property. As a result, 75.75 percent of all business personal property in the State was exempt from the tax. 885 F.2d at 416. The court of appeals held that because "the exemptions apply to three-fourths of the commercial and industrial property in Nebraska, and do not apply to rail cars, the tax system in Nebraska discriminates against Trailer Train and violates" subsection (b)(4). *Id.* at 418; see also *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 209-10 (8th Cir.) (personal property tax that exempted all personal property of locally assessed businesses from tax violated subsection (b)(4)), *cert. denied*, 454 U.S. 1086 (1981). *Leuenberger* is indistinguishable from this case and this Court should endorse its requirement of equal tax treatment for rail personal property.

Petitioner's contrary view, that a state tax discriminates against railroads only if "it falls on railroads alone or as one of a relatively small and insular group" (Pet. Br. 37), is too narrow. To be sure, a state tax imposed solely on railroads or rail property would violate subsection (b)(4). *E.g.*, *Burlington N. R.R.* v. *City of Superior*, 932 F.2d 1185, 1188 (7th Cir. 1991); see United States Br. 21. But the scope of the provision is not so limited.

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of the commercial and industrial property as the base rate is preferable to the selection of . . . the weighted average of the rates imposed on all commercial and industrial property").

The standard proposed by petitioner is wholly inadequate to provide the political check Congress deemed necessary, and which petitioner itself concedes is central to § 11503(b)(4). Petitioner's formulation would "allow the state to discriminate against the railroads by simply making sure that only a few powerless business taxpayers pay" a given tax. *Kansas City S. Ry.* v. *McNamara*, 817 F.2d 368, 375 n.13 (5th Cir. 1987). Such a political check is no check at all. Indeed, the very discriminatory taxes that prompted Congress to enact § 11503 often classified railroads together with public utilities. See, *e.g.*, S. Rep. No. 630, 91st Cong., 1st Sess. 6 (1969). Petitioner's proposed standard would permit States to engage in the same sort of discrimination that required congressional action in the first instance.

Moreover, Congress itself rejected such a standard in the other provisions of subsection (b). While those provisions prevent States from imposing discriminatory assessments and tax rates that "single out" railroads for higher tax burdens, they are not so limited. Thus, even if a substantial amount of business property is assessed at the same assessment ratio as railroad property, a state tax is still unlawful under subsection (b)(1) if the assessment ratio for railroad property exceeds the average ratio for *all* commercial and industrial property. Similarly, even if a substantial percentage (but less than 50 percent) of the property in the jurisdiction is taxed at the same rate as railroads, subsection (b)(3) requires that railroads be taxed at the majority rate, if lower.

In each case, Congress clearly could have legislated solely to bar state assessment practices and tax rates that "singled out" railroads. Yet it did not do so. Instead, Congress determined that greater protection was needed, and thus the guiding principle in the statute is: railroad personal property should be treated no worse than most other business personal property generally. Construing subsection (b)(4) far more narrowly, as petitioner pro-

poses, must be rejected as contrary to the best evidence of Congress' intent derived from the structure of the law.

The suggestion by *amici* National Conference of State Legislatures *et al.* ("NCSL"), that subsection (b)(4)—unlike subsections (b)(1) through (b)(3)—is limited to intentional discrimination, is erroneous as well. The plain language of subsection (b)(4) prior to recodification flatly contradicts such an interpretation: as originally enacted, the provision barred "any other tax which *results in* discriminatory treatment of" railroads. § 306(1)(d), 90 Stat. at 54 (emphasis added). The language prohibiting discriminatory results clearly prohibits disparate impact, not discriminatory intent.[33] See, *e.g.*, *General Bldg. Contractors Ass'n, Inc.* v. *Pennsylvania*, 458 U.S. 375, 386 (1982). NCSL seeks to avoid this plain language by asserting that "Congress' elimination of 'results' language in the recodification belies any suggestion that the language demands an effects test." NCSL Br. 19 n.15. But Congress expressly precluded such a contention by instructing that the recodification "may not be construed as making a substantive change in the laws replaced." See *supra* n.4.

In support of their interpretations, petitioner and its *amici* NCSL rely on interpretative principles derived from this Court's preemption decision in *Cipollone* v. *Liggett Group, Inc.*, 112 S. Ct. 2608 (1992). Those principles do them no good. Even if § 11503 were subject to a "fair but narrow" standard of interpretation, which it is not, see *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2454 (1992), that interpretation still must be fair, not just narrow. At a minimum, a fair

[33] Moreover, "Subsection (b) speaks only in terms of 'acts' which 'unreasonably burden and discriminate against interstate commerce'; nowhere does it refer to the intent of the actor." *Burlington N. R.R.* v. *Oklahoma Tax Comm'n*, 481 U.S. 454, 463 (1987). Although the decision in *Burlington Northern* addressed whether a showing of intentional discrimination was required for overvaluation claims under subsection (b)(1), the "acts" language quoted above applies to subsection (b)(4) as well.

reading requires an interpretation that allows the statute reasonably to achieve Congress' purpose, see *Morales* v. *Trans World Airlines, Inc.*, 112 S. Ct. 2031, 2036 (1992), not to ignore it altogether as petitioner and NCSL propose to do. Instead, the fair but narrow reading of subsection (b)(4) is that of respondents: a State is prohibited from imposing a tax on railroad personal property while exempting most other business personal property from the tax.

2. *Whether A State Has Rational Reasons For Exempting Other Business Property From Tax May Not Properly Be Considered As A Defense To A Claim Under Subsection (b)(4).*

That a State can offer an "independently valid reason" for exempting other business property from a tax does not excuse the State from treating railroad property the same as other business property—under either subsection (b)(1), subsection (b)(3), or subsection (b)(4). Petitioner's broad argument, and the United States' much narrower argument, to the contrary are meritless.

Petitioner argues that exemptions from a generally applicable tax do not violate subsection (b)(4) so long as those exemptions are based on "independently valid reason[s]." Pet. Br. 41. Nothing in § 11503 supports such a view. To the contrary, an inquiry into the "reasonableness" of a State's discrimination is contrary to the plain language of subsection (b) itself, which deems a tax that discriminates against railroads to be an act that "unreasonably burden[s] and discriminate[s] against interstate commerce." 49 U.S.C. § 11503(b). The original language of § 11503(b) is even more clear: "any action described in this subsection is declared to constitute an unreasonable and unjust discrimination against, and an undue burden on, interstate commerce." § 306(1), 90 Stat. at 54.[34] The

[34] *See also, e.g.*, Webster's New Twentieth Century Dictionary Unabridged 522 (2d ed. 1983) (defining "discriminate" as "to make distinctions in treatment, show partiality (in favor of) or prejudice (against)").

language of the section itself makes unnecessary the Commerce Clause-like inquiry into reasonableness that petitioner and its *amici* NCSL propose. In addition, subsections (b)(1) through (b)(3) flatly reject such an inquiry. No matter what "valid reasons" a State may have for assessing commercial and industrial property differently from railroad property, and no matter what "valid reasons" a State may have for taxing commercial and industrial property at a different rate than railroad property, such discrimination is nevertheless unlawful.

Petitioner's proposed interpretation reduces the protection of subsection (b)(4) to a nullity. As petitioner and its *amici* NCSL readily admit, under the deferential standards this Court applies to federal constitutional review of state taxes, which they seek to incorporate into subsection (b)(4), "virtually any exemption for a particular business or piece of property" (NCSL Br. 24) would be valid. Allowing state tax exemptions to be justified by the "obvious state policy of affirmatively encouraging or relieving from burdens, the beneficiary of the exemption" (*id.*), therefore, would leave subsection (b)(4) barren and its protection never to be invoked.[35] As this Court stated in *Bacchus Imports, Ltd.* v. *Dias*, 468 U.S. 263, 273 (1984):

> Virtually every discriminatory statute allocates benefits or burdens unequally; each can be viewed as conferring a benefit on one party and a detriment on the other, in either an absolute or relative sense. The determination of constitutionality does not depend upon whether one focuses upon the benefited or the burdened party. A discrimination claim, by its

[35] *Amici* NCSL suggest that the subsection (b)(4)'s "principal function . . . is to enable railroads to come directly to federal court under subsection (c)'s lifting of the bar of the Tax Injunction Act." NCSL Br. 23 n.23. This suggestion simply cannot be reconciled with the language of subsection (b), which on its face provides substantive content to the provision. Moreover, adding a meaningless substantive prohibition to subsection (b) is a bizarre way, to say the least, of creating an exception to the Tax Injunction Act.

> nature, requires a comparison of the two classifications, and it could always be said that there was no intent to impose a burden on the one party, but rather the intent was to confer a benefit on the other.

Congress is presumed not to enact such sterile legislation, see, *e.g.*, *Wisconsin Dep't of Revenue* v. *William Wrigley, Jr., Co.*, 112 S. Ct. 2447, 2455 (1992); *Arizona Pub. Serv. Co.* v. *Snead*, 441 U.S. 141, 151-52 (1979) (Rehnquist, J, concurring), and there is no reason here to disregard that presumption.

The approach proposed by the United States, while more in accord with Congress' obvious intent in enacting § 11503 to protect railroads from discriminatory taxes, nevertheless fails to give full effect to the statutory language. Relying principally on cases involving the doctrine of intergovernmental tax immunity,[36] the United States asserts that a State can "justify" its discrimination by showing " 'significant differences between the two classes.' " United States Br. 18 (quoting *Davis* v. *Michigan Dep't of Treasury*, 489 U.S. 803, 815-16 (1989)). But, as with petitioner's construction, this reading ignores the original language of § 11503(b), which deems discrimination against railroads to constitute "unreasonable and unjust discrimination against interstate commerce" without a further showing that the discrimination against railroads is itself unjust or unreasonable.

Moreover, the largely standardless inquiry the United States proposes—under which the lower courts are enjoined to evaluate proffered justifications on a case-by-case basis in light of the statutory purpose (United States Br. 21)—in itself is grounds for rejecting the United States' suggestion. Although the United States rejects several possible justifications as insufficient, it leaves open a question of what unspecified justifications might suffice, and ex-

[36] The United States also relies on cases construing the prohibition against rate discrimination of the Interstate Commerce Act. United States Br. 17. The pricing decisions of interstate carriers, however, cannot readily be analogized to the tax policies of a State.

presses no opinion on whether the exemptions at issue here are justified under its approach. *Id.* 22 & n.27. It is difficult to see how the approach proposed by the United States resolves any of the purported confusion that prompted it to recommend that this Court grant certiorari in the first instance. United States Br. 11-14 (at petition stage). Instead, by opening up an undefined inquiry into justifications for exemptions, the approach suggested by the United States will only undercut the workable approach followed to date by the courts of appeals.

If, however, this Court were to adopt the approach outlined by the United States in its brief, it is clear that under that approach the Oregon tax is unlawful and the judgment of the Ninth Circuit should be affirmed. It is beyond dispute that respondents have made out a prima facie case of discrimination, and under the stipulated facts, petitioner cannot justify that discrimination. Accordingly, a remand under the United States' theory to the court of appeals is wholly unnecessary.

Most importantly, the United States' embrace of the Eighth Circuit's decision in *Trailer Train Co.* v. *Leuenberger*, 885 F.2d 415, 418 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), as "within the core of 'discrimination'" (United States Br. 21) should end the matter: factually this case is identical to *Leuenberger*. In *Leuenberger*, as described above, see *supra* p. 30, 75 percent of business personal property in the State was exempt; here, under the same exemptions as were at issue in *Leuenberger*, at least 67 percent is exempt. That difference is not material.

In addition, petitioner has wholly failed to proffer any "significant differences" to justify its differential taxation. As this Court made clear in *Davis*, in making this determination "it is inappropriate to rely solely on the mode of analysis developed in our equal protection cases." 489 U.S. at 816. It simply is not enough that "the State has a rational reason for discriminating": "[t]he State's interest in adopting the discriminatory tax, no mater how substantial, is simply irrelevant" to whether there are substantial differences "justifying" the discrimination. *Id.*; see also *Barker* v. *Kansas*, 112 S. Ct. 1619, 1622-23 (1992). Moreover, as the United States makes clear, an exemption can never be justified on the ground that the property is subject to other taxes to which railroad property is also subject. Thus, for example, "[a] State's exemption of business inventories . . . could not be justified on the ground that such inventories may be expected to generate additional sales, use or income taxes," because the same taxes apply to railroad property. United States Br. 22.

The only justification suggested by the United States as a permissible basis upon which a State might exempt certain property—in this case motor vehicles—is that "the exempt property is subject to alternative state or local taxes that are not levied against railroads."[37] *Id.* Not only is this justification not properly one to be consid-

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[37] As stated previously, standing timber is real property, not personal property, *see supra* n.7, and so is simply irrelevant to this case. *See infra* pp. 38-42. But even if standing timber were treated as personal property, that would only exacerbate, not lessen, the extent of discrimination. Standing timber is exempt from property tax and subject instead to a severance tax imposed when it is harvested. Ore. Rev. Stat. §§ 321.272, .420. But a severance tax is not a tax on property, it is a tax on the harvesting of timber: timber that is not harvested is not taxed. *E.g.*, Ore. Rev. Stat. §§ 321.015, .277, .425. It is a transaction tax, not a property tax. Nor does timber bear a comparable share of the State's property tax burden. In 1988, the timber severance taxes received by Oregon amounted to $26.4 million. Stipulation No. 40, J.A. 19. Had standing timber been subject to property tax, however, the revenue from that tax, imposed on the stipulated $11.6 billion in standing timber, would have been approximately $288 million. *See* Stipulation No. 42, J.A. 19 (average ad valorem property tax rate for 1988 tax year was 2.489%). If standing timber is included in the calculations, the percentage of exempt property rises to over 80%.

ered,[38] but no factual basis for such a justification has been made—or could be made—in this case. Motor vehicle owners in Oregon plainly do not "bear a comparable share of the State's tax burden *on property*." United States Br. 22 (emphasis in original). The fee is not a property tax, but a registration fee, payable to the Department of Motor Vehicles. In 1988, it amounted to a flat $10 per year for business motor vehicles (Ore. Rev. Stat. § 803.420 (1987)), and would be equivalent to the property tax burden only if the market value of business motor vehicles in Oregon averaged no more than $400.[39] Therefore, even under the United States' approach, the Oregon tax violates § 11503(b)(4).

3. *The Proper Comparison Under § 11503 Is Between Railroad Tangible Personal Property and Other Business Tangible Personal Property.*

Finally, petitioner also is incorrect when it asserts that courts need not separate real property from personal property in evaluating whether a state tax discriminates against railroads. Pet. Br. 40 n.51. Petitioner's proposal to sweep its discrimination against railroad personal property under the real property rug is baseless. The proper comparison is between railroad tangible personal property and other business tangible personal property, not between railroad tangible personal property and all other business property the State chooses to tax.

It is common ground between the parties that § 11503 preserves State authority to distinguish among traditional, broad classes of property—real, tangible personal, and

[38] *See Arizona Pub. Serv. Co.* v. *Snead*, 441 U.S. 141, 149-50 (1979) ("To look narrowly to the type of tax the federal statute names, rather than to consider the entire tax structure of the State, is to be faithful not only to the language of that statute but also to the expressed intent of Congress in enacting it").

[39] A $10 annual registration fee, given the average property tax rate in 1988 of 2.489% (Stipulation No. 42, J.A. 19), would equate to a per-vehicle market value of only $403.

intangible personal property—so long as railroad property is taxed the same as other property within that class. Only property within those broad classes is comparable for purposes of § 11503: real property is comparable only to other real property, tangible personal property is comparable only to other tangible personal property, and intangible personal property is comparable only to other intangible personal property. Whether understood as based on traditional and long-recognized property law distinctions among those classes, or in terms of their different underlying political constituencies, Congress' intent to preserve those distinctions is plain,[40] as the courts of appeals have unanimously recognized.[41] Indeed, such a result is essential for the statutory scheme to make sense: otherwise, the exemption from property tax that Oregon [42] provides to intangible personal property would

[40] *See* S. Rep. No. 1483, 90th Cong., 2d Sess. 10-11 (1968) (act "is not intended to interfere with the classification of property by a State for rate purposes into the traditional breakdown of real property, tangible personal property, and intangible property"); S. Rep. No. 630, 91st Cong., 1st Sess. 11 (1969) (same). The language of § 11503 does not address this issue. Although prior to recodification § 11503(a)(4) defined "commercial and industrial property" to include "all property, real or personal," § 306(3)(c), 90 Stat. at 55, that all inclusive definition merely establishes the reach of subsections (b)(1) through (b)(3); it does not purport to require that "all property, real or personal" be taxed at the same rate or the same ratio of assessed to market value, much less that the proper comparison under subsection (b)(4) be made on an all property basis.

[41] *See, e.g., Burlington N. R.R.* v. *Bair*, 766 F.2d 1222, 1224-25 (8th Cir. 1985); *Clinchfield R.R.* v. *Lynch*, 700 F.2d 126, 132-33 (4th Cir. 1983); *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 209-10 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981); *see also ABF Freight Sys., Inc.* v. *Tax Division*, 787 F.2d 292, 298-99 (8th Cir. 1986) (construing Motor Carrier Act of 1980); *Arkansas-Best Freight Sys., Inc.* v. *Lynch*, 723 F.2d 365, 367-68 (4th Cir. 1983) (same).

[42] All but nine States, like Oregon, completely exempt intangible personal property from tax. Bowman, Hoffer, & Pratt, *Current*

preclude altogether the imposition of property taxes on railroad real and tangible personal property in the State.[43] See also Brief of the Railway Progress Institute *et al.* ("RPI") as *Amici Curiae* 6-17.

While accepting that § 11503 draws these broad lines of comparability, petitioner nevertheless asserts that in this case real property must be grouped with tangible personal property in determining whether Oregon's exemptions discriminate against respondents. According to petitioner, because "Oregon's tax system does not distinguish between real and personal property *for rate and assessment purposes*" (Pet. Br. 40 n.52) (emphasis added), there is no reason to distinguish between real and personal property for other purposes. Petitioner is incorrect on several grounds.

Initially, petitioner is incorrect as a factual matter when it asserts that Oregon does not distinguish between real property and personal property for assessment purposes. The stipulated facts show that, despite the state law requirement that property be assessed at full market value, almost half the value of taxable business personal property in Oregon goes untaxed, either because of undervaluation or underreporting. Stipulation Nos. 30, 31, 43, J.A. 18-19. The record indicates no comparable undervaluation or underreporting of real property, as petitioner itself noted in the district court. See Defendants' Response

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Patterns and Trends in State and Local Intangibles Taxation, 43 Nat'l Tax J. 439, 441 (1990). Even in the nine States that tax intangible personal property, intangibles generally are placed "in a property class that typically is taxed at a lower effective rate than most other classes," *id.*, which could well preclude taxing railroad property at any different rate.

[43] As of January 1, 1986, the estimated market value of intangible personal property in Oregon was $65 billion. Stipulation No. 41, J.A. 19. Although that number is not limited to business intangible personal property, the amount of such property, all of which is exempt from property tax, clearly would dwarf the amount of taxed business real and tangible personal property in the State.

to Court's Question 2 (attached as addendum A to the Reply Brief of Plaintiffs-Appellants in the court of appeals). Thus, notwithstanding the nominal requirements of state law, Oregon *de facto* distinguishes between real and personal property for assessment purposes.

In any event, whether Oregon distinguishes between real and personal property for rate and assessment purposes is beside the point. At a minimum, the question should be whether Oregon distinguishes between real and personal property for exemption purposes, and the answer to that question plainly is yes. Tangible personal property in Oregon is subject to very different tax exemptions from those that the State has granted to real property. For example, retail establishments are subject to tax on the market value of their real property; their personal property, however—such as inventories and delivery vehicles—is substantially exempt from tax. See Ore. Rev. Stat. § 307.400(2), (3)(d) (exempting business inventories); § 803.585 (exempting motor vehicles).

Moreover, what constitutes comparable property under § 11503 cannot be controlled by whether at a given time a State taxes particular classes of property at the same rate and assessment ratio. What Congress intended to be comparable property remains comparable property; the State cannot override congressional intent. See *Western Air Lines, Inc.* v. *Board of Equalization*, 480 U.S. 123, 129-30 (1987) ("[t]he general principle that, absent a clear indication to the contrary, the meaning of words in a federal statute is a question of federal law has especial force when the purpose of the federal statute is to eliminate discriminatory state treatment of interstate commerce"). Because Congress intended the comparisons under § 11503 to be made within the traditional categories of real property, tangible personal property, and intangible personal property, that is what must be done.

The consequence of, and the motivation behind, petitioner's argument should be obvious: by grouping tangible

personal property and real property together, a State could exempt all business personal property from tax yet not be found to violate subsection (b)(4). See RPI Br. 15-17. In many States, including Oregon, the amount of business real property is substantially larger than the amount of tangible business personal property. See Manvel, *A Property Tax Update*, Tax Notes (Feb. 3, 1992), at 609, 611 (real property constitutes 62 percent of total business tangible assets). In those States, including both real and personal property in the comparison would mask the discrimination against rail property that results from the substantial exemptions of other business personal property.

* * * *

Under the proper standard, Oregon's tax violates subsection (b)(4). The facts are stipulated. The total amount of taxed, business personal property is $4.8 billion. Stipulation Nos. 30, 31, J.A. 18; see *supra* p. 5. The total amount of exempt business personal property, including motor vehicles, is $9.7 billion.[44] Stipulation Nos. 32-34, J.A. 18; see *supra* pp. 6-7. Over two-thirds of other business tangible personal property is wholly exempt from tax. Respondents' personal property, meanwhile, "was assessed and taxed . . . at no less than its true cash value." Stipulation No. 29, J.A. 18. By exempting over two-thirds of personal property of other businesses while fully taxing respondents' rail cars, Oregon's tax violates § 11503(b)(4).

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[44] When the $4.4 billion of undervalued and underreported property is included, the amount of untaxed business personal property in Oregon rises to $14.1 billion, 75 percent of the total. Stipulation Nos. 37, 43, J.A. 18-19. Given the amount of personal property statutorily exempt from tax, however, this Court need not decide precisely how undervalued and underreported property should be considered or under what circumstances exemption of less than 50 percent of business personal property might violate § 11503(b).

II. THE PROPER REMEDY FOR THE VIOLATION OF SUBSECTION (b)(4) IN THIS CASE IS TO ENJOIN COLLECTION OF THE OREGON TAX AS APPLIED TO RESPONDENTS' TANGIBLE PERSONAL PROPERTY.

The Ninth Circuit properly held that the appropriate remedy for the violation of § 11503(b) in this case was to enjoin petitioner from assessing or collecting Oregon's tax on respondents' tangible personal property. Because Oregon fully taxes rail cars while it completely exempts over two-thirds of other business personal property, an injunction against the tax as applied to respondents' personal property is entirely proper. Under these circumstances, any lesser relief would leave respondents' property in a disadvantaged position relative to most other business personal property in the State, and, thus, would not fully remedy the violation of § 11503.[45]

As demonstrated above, see *supra* pp. 26-42, § 11503 (b)(4) mandates that, at a minimum, rail property receive equal tax treatment with most other business property in a State. Under this standard, Oregon's tax is unlawful because it fully taxes respondents' rail cars while exempting over two-thirds of the other business personal property in the State.

The appropriate remedy for such discrimination follows directly from the standard for discrimination itself: [46]

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[45] The United States identifies, as a preliminary question, whether § 11503 grants federal courts the power to enjoin violations of subsection (b)(4) at all. United States Br. 24-27. The United States properly concludes, however, that the language creating a five percent threshold for assessment claims, *see* § 11503(c), must be read as doing only that, and not "strip[ping] all plausible meaning from the language that authorizes federal courts to enjoin 'any acts' in violation of the statute." United States Br. 26-27.

[46] *Cf. Milliken* v. *Bradley*, 433 U.S. 267, 281-82 (1977) (stating the "well-settled principle that the nature and scope of the remedy are to be determined by [the nature and scope of] the violation").

if a tax discriminates by treating rail cars differently from the majority of business personal property, the discrimination is properly remedied by treating rail cars the same as most other business personal property. If most other business personal property is wholly exempt from a tax, then rail personal property likewise should not be taxed. Accordingly, the remedy ordered by the court of appeals was appropriate: an injunction against the Oregon tax being collected on respondents' personal property.[47]

The courts of appeals that have addressed similar discriminatory taxes have reached identical conclusions. In *Trailer Train Co.* v. *Leuenberger*, 885 F.2d 415 (8th Cir. 1988), *cert. denied*, 490 U.S. 1066 (1989), the court of appeals found that the State of Nebraska violated § 11503(b)(4) by exempting 75.75% of business personal property from its tax on tangible personal property. "The appropriate remedy," the court held, "is to enjoin the collection of the discriminating tax, even though other taxpayers do not receive the same benefits." *Id.* at 418. Likewise, in *Ogilvie* v. *State Bd. of Equalization*, 657 F.2d 204, 209-10 (8th Cir.), *cert. denied*, 454 U.S. 1086 (1981), the court of appeals held that North Dakota violated § 11503(b)(4) by exempting completely the personal property of locally assessed businesses from tax while taxing the personal property of centrally assessed businesses (public utilities and railroads). Again, the court concluded that the appropriate remedy was to treat the "personal property of the railroads [as] exempt from taxation, the same as all other commercial and industrial property." *Id.* at 210.[48]

[47] Whether under other circumstances a court might appropriately order proportional relief need not be decided in this case.

[48] The decision in *Burlington Northern R.R.* v. *Bair*, 766 F.2d 1222 (8th Cir. 1985), also is consistent with this approach but afforded a different remedy on different facts. The State of Iowa "rolled back" all personal property assessments by a fixed percentage so that the total personal property tax base was equal to the 1973 level. It also granted a "credit" against the remaining assessed value. The effect of the rollback and credit was to exclude 95 percent of personal property owners from taxation. Iowa did not, however, afford similar rollback and credits to railroad personal property. The court of appeals held that the failure to provide similar rollback and credits to railroad personal property violated subsection (b)(4). The proper remedy, the court held, was to provide the rollback and credits to railroad property, not necessarily to exempt railroad personal property completely from tax. "[I]f Burlington Northern's personal property is of such value that tax is still due after the rollback and credit, it must pay tax like any other substantial property owner." *Id.* at 1224.

An order enjoining collection of the tax in part, which petitioner and the United States urge as the appropriate remedy here, would be wholly inadequate to cure the discrimination suffered by respondents in Oregon. Such relief would afford respondents an injunction against 67 percent of the tax on its personal property. But even with such a remedy, rail property still would be discriminated against because it still would be treated differently from most other business personal property in the State, which remains 100 percent exempt from tax.

The reliance placed by petitioner and the United States on the availability of a proportional reduction in tax under subsections (b)(1) and (b)(3) (see Pet. Br. 42-43; United States Br. 29) is misplaced. Petitioner does not, and cannot, contend that the language of subsection (b)(4) mandates partial reduction in tax as the only permissible remedy. For example, subsection (b)(1)—prior to its recodification—described the "prohibited act[]" as the assessment of railroad property at higher than the average ratio of assessed to market value of commercial and industrial property, "*(but only to the extent of any portion based on excessive values as hereinafter described)*" (emphasis added). The legislative history of the provision explains that "[t]he parenthetical clause beginning with the word 'but' is intended to make

clear that only the discriminatory portion, that is, the excessive value part of an assessment is proscribed." S. Rep. No. 630, 91st Cong., 1st Sess. 10 (1969). Subsection (b)(4) has never contained any comparable language.

An order enjoining payment of a tax in part adequately remedies violations of subsections (b)(1) through (b)(3). Reducing the assessment ratio for railroad property to the average assessment ratio for commercial and industrial property remedies a violation of subsection (b)(1). Reducing the tax rate imposed on railroad property to the tax rate imposed on the majority of commercial and industrial property remedies a violation of subsection (b)(3). Enjoining payment of the Oregon tax at issue here in part, however, simply fails to remedy the discrimination. Rather than taxing railroad personal property the same as other business personal property, railroad property continues to be taxed differently.

In the end, petitioner is simply wrong when it states that, by seeking an injunction against the tax here, respondents are "seeking tax immunity." Pet. Br. 44-45. Section 11503 does not immunize railroads from all taxes, but rather prohibits states from imposing discriminatory taxes. Under a proper analysis, Oregon retains full authority to tax railroad real property and to impose personal property taxes on rail cars so long as it ensures that respondents' personal property is not discriminated against when compared to the personal property owned by other businesses in the State. That the necessary and proper remedy in this case is an injunction against the Oregon tax as applied to respondents does not immunize railroads from all taxes, or even from a fair and non-discriminatory personal property tax.

CONCLUSION

For the foregoing reasons, the judgment of the court of appeals should be affirmed.

Respectfully submitted,

JAMES W. MCBRIDE *
HEISKELL, DONELSON, BEARMAN, ADAMS, WILLIAMS & CALDWELL
1211 Connecticut Ave., N.W.
Washington, D.C. 20036
(202) 331-8501

CARTER G. PHILLIPS
CHRISTOPHER R. DRAHOZAL
SIDLEY & AUSTIN
1722 Eye Street, N.W.
Washington, D.C. 20006
(202) 736-8000

Counsel for Respondents

* Counsel of Record

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